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United States Court of Appeals *for the* Second Circuit

FOX NEWS NETWORK, LLC,

Plaintiff-Appellee-Cross-Appellant,

- v. -

TVEYES, INC.,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* INTERNET ARCHIVE, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES, AND SOCIETY OF AMERICAN ARCHIVISTS IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-APPELLEE

Brianna L. Schofield
SAMUELSON LAW, TECHNOLOGY
& PUBLIC POLICY CLINIC
UC Berkeley School of Law
356 Boalt Hall
Berkeley, CA 94720
(510) 644-4875
brianna.schofield@law.berkeley.edu

Lila Bailey
THE LAW OFFICE OF LILA BAILEY
25 Taylor Street
San Francisco, CA 94102
(415) 335-6833
lila@lilabailey.com

On the brief:
Tomasz Barczyk
J. William Binkley
(Samuelson Clinic
Law Students)

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), *amici curiae* Internet Archive, American Library Association, Association of College and Research Libraries, Association of Research Libraries, and Society of American Archivists state that none of these entities have a parent or subsidiary corporation, and no publicly held corporation owns 10% or more of any of these entities' stock.

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STATEMENT OF INTEREST¹

The Internet Archive is a public nonprofit organization that was founded in 1996 to build an “Internet library,” with the purpose of offering researchers, historians, scholars, artists, and the general public permanent access to historical collections in digital format. Located in San Francisco, California, the Internet Archive receives data donations and collects, records, and digitizes material from a multitude of sources, including libraries, educational institutions, government agencies, and private companies. The Internet Archive then provides free public access to its data—which include text, audio, video, software, and archived web pages.

Among other ephemeral media, the Internet Archive collects and preserves television news and political ads, respectively through its TV News Archive and Political TV Ad Archive. The TV News Archive harnesses closed captioning to index more than 995,000 television news programs. The public can use the index of searchable text and video clips to explore television news, discover important

¹ *Amici curiae* hereby state pursuant to Fed. R. App. P. 29(c)(5) and Rule 29.1 of the United States Court of Appeals for the Second Circuit that none of the parties to this case nor their counsel authored this brief in whole or in part; nor did any such party or its counsel contribute money intended to fund preparing or submitting this brief; nor did any person other than the *amici curiae* and their counsel contribute money that was intended to fund preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all parties.

resources, understand context, evaluate assertions of fact, compare and contrast media, and share insights. The Political TV Ad Archive is a searchable, viewable, and shareable online database of political television ads from the 2016 presidential campaigns, collected from twenty markets in eight key primary states. It provides users with access to more than 1,000 unique ads, which are paired with information about their sponsors, sources of funding, and details about when, where, and how often the ads have aired. Like library collections of books and newspapers, the TV News Archive and the Political TV Ad Archive allow anyone to access content from these influential media, enhancing the work of journalists, scholars, teachers, librarians, civic organizations, and other engaged citizens.

The American Library Association (“ALA”) is a nonprofit professional organization of more than 58,000 librarians dedicated to providing and improving library services and promoting the public interest in a free and open information society. The Association of College and Research Libraries (“ACRL”), the largest division of the ALA, is a professional association of academic and research librarians. The Association of Research Libraries (“ARL”) is a nonprofit organization of 125 research libraries in North America, including university, public, government, and national libraries. Collectively, these three associations represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

The Society of American Archivists (“SAA”) is the oldest and largest organization of archivists in North America. It serves the education and information needs of its members, including more than 6,200 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation’s historical record. To fulfill this mission, SAA exerts active leadership on significant archival issues by shaping policies and standards, and serves as an advocate on behalf of both professionals who manage archival records and the citizens who use those records.

Amici curiae file this brief to highlight the public benefits that flow from archiving and making television content available for public access, as well as the importance of fostering a robust community of archiving organizations. Copyright is not intended to stand in the way of such benefits. Fair use ensures that copyright law encourages the creativity and innovation it is supposed to protect.

SUMMARY OF ARGUMENT

Television is a pervasive and persuasive, but largely ephemeral, medium of expression. In addition to being a staple form of entertainment in American households, television is a key source of information for many Americans. Local and national television news keep the public apprised of current events, and political ads influence how voters cast their ballots. Although these broadcasts are

freely available to the public when they air, they generally vanish from the public eye as soon as they leave the television screen.

Archiving services prevent this disappearance by collecting, indexing, and preserving broadcast content for future access. Creating a searchable database of ephemeral television content is a transformative use that serves a fundamentally different purpose than the original broadcasts. While the original broadcasts deliver content to inform or persuade the public, archives provide access to previously broadcast content to allow users to search across, and draw data from, a comprehensive collection. Repurposing broadcast data in this manner serves the public interest in two important ways. First, it allows the public to review previously aired broadcasts to analyze discrete statements contained within them, thus encouraging public discourse and political accountability. Second, television archives provide access to an aggregated database of television content, surfacing information about the broadcasts themselves and unlocking researchers' ability to process, mine, and analyze content as data.

Because television broadcasts are ephemeral by nature, content is easily lost if efforts are not made to preserve it systematically. Indeed, a number of historically and culturally significant broadcasts have already disappeared. The task of collecting and preserving these cultural artifacts should not fall to a mere handful of archiving organizations; a robust network of television archives would

help ensure that a comprehensive collection of television content is available for use. Accordingly, this brief explains why comprehensive archiving efforts are fair use.

ARGUMENT

I. Recording, indexing, and making television broadcasts available is a transformative and publicly beneficial use of content that allows the public to access information and analyze broadcast media.

“The ultimate goal of copyright is to expand public knowledge and understanding” by incentivizing the creation of new works. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015) (“*Google Books*”). In order to further this goal, the fair use exception embedded within copyright law guarantees “breathing space” for some uses of copyrighted material. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The statutory fair use analysis considers four factors, *see* 17 U.S.C. § 107, which courts must weigh together “in light of the purposes of copyright.” *Campbell*, 510 U.S. at 577–78.

This brief specifically addresses the transformative character of searchable television databases and the many public benefits such databases provide.

“[T]ransformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.” *Google Books*, 804 F.3d at 214. Relatedly, copying is more

likely to be a fair use when it “produces a value that benefits the broader public interest.” *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)).

Converting television broadcasts into a searchable database is “quintessentially transformative.” *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014). In *HathiTrust*, this Court found that “the creation of a full-text searchable database is a quintessentially transformative use [T]he result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn.” *Ibid.* The same reasoning applies to searchable databases of television clips. The purpose of the original programming is to inform or entertain, but a television database serves a very different function by allowing users to search across, and draw data from, a vast digital collection of content. Consistent with this purpose, television archives typically impose limitations to mitigate any potential harm to content creators.²

The systematic collecting and indexing of television also provides a crucial public benefit by opening up access to content, and data about the content, that

² For example, the Internet Archive’s TV News Archive limits the length of video clips accessible to users and delays making the clips publicly available for twenty-four hours after the original broadcast. Contrary to assertions in TVEyes’ Opening Brief, *see* Br. Def.-Appellant-Cross-Appellee 48, the Internet Archive’s Terms of Use offer access for scholarship and research purposes only, not “for *any* purpose.” The TV News Archive also allows users to embed or share a link to a particular clip, but not to post or email the actual clips. *See id.* at 48 n.12.

would otherwise disappear or be impractical to find. Systematic efforts to record and index broadcasts are relatively recent, and the public typically loses access to the content as soon as it disappears from the television screen. This pattern of accessibility conforms with the purpose of most programming. For instance, television news broadcasts seek to provide current coverage of issues and events, so content stops being aired as soon as it becomes outdated. Political ads aim to persuade voters during a campaign season, so they too disappear from the airwaves after a short period of time. However, there is also great social value in having access to television content even after it ceases to be “current.” In order to improve accessibility, television databases may include functions—such as the ability to embed, link to, view in context, bookmark, or download short clips—that help make information more available and useful to the public.

The value of this benefit is particularly apparent where the creation of an archive of television content contributes to public discourse and transparency. This happens in two ways. First, television archives empower journalists and the general public to find, access, and scrutinize the content of past broadcasts. Second, television archives enable media broadcasts to be treated as data that can be aggregated and studied on a large scale. In both cases, the public benefit hinges on users’ ability to access and utilize a comprehensive collection of indexed television.

A. Television archives facilitate access to, and verification of, discrete information in past broadcasts, promoting public discourse and political accountability.

As the district court astutely observed, “[d]emocracy works best when public discourse is vibrant and debate thriving. But debate cannot thrive when the message itself (in this case, the broadcast) disappears after airing into an abyss.” *Fox News Network, LLC v. TVEyes, Inc.*, No. 13-CV-5315, 2015 WL 5025274, at *6 (S.D.N.Y. Aug. 25, 2015). This is especially true of political messages: politicians’ statements and political ads are crucial raw material for public discourse, but unless they are preserved and made accessible, they disappear from the public eye as soon as they are broadcast. It is particularly important that the availability of such political statements be recognized as a fair use, since “[t]he more newsworthy the person or event depicted, the greater the concern that too narrow a view of the fair use defense will deprive the public of significant information.” *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996); *see also Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (identifying the fair use defense as one of copyright law’s “built-in First Amendment accommodations” that gives “considerable latitude for scholarship and comment”) (internal quotation marks and citation omitted).

It is not enough that broadcasts are merely saved, however; preserved content is useful for the purposes of “criticism, comment, [or] news reporting,” §

107(1), only if the content is indexed, searchable, and available to be assessed and shared. Television archives do just that. For example, the Internet Archive's TV News Archive has collected and indexed more than 995,000 news programs from market areas around the country, while the Political TV Ad Archive has collected and indexed more than 1,000 unique political ads. In doing so, the TV News Archive and Political TV Ad Archive permit users to search for, identify, and examine clips that contain content of interest, including statements made by politicians.

The availability of archived and searchable television content thus enhances political discussions by surfacing the very content that fuels such discourse. For example, ThinkProgress used a TV News Archive clip of U.S. Senator Mike Lee's statements to the Senate, in which he predicted that President Obama's reelection would lead to a steep rise in oil prices, to show that the Senator's predictions had not come true. Jedd Legum, *4 Things that Were Supposed to Happen by 2015 Because Obama Was Reelected*, ThinkProgress (Jan. 1, 2015), <http://thinkprogress.org/economy/2015/01/01/3607416/4-things-2015-obama-reelected/> (embedding clip from the TV News Archive). Similarly, an article by Mother Jones used a TV News Archive clip to highlight a statement by former Arkansas Governor Mike Huckabee that implied that cold winter weather was inconsistent with global warming. Jeremy Schulman, *Attention GOP Presidential*

Candidates: Winter Does Not Disprove Global Warming, Mother Jones (Jan. 26, 2015), <http://www.motherjones.com/environment/2015/01/snow-cold-global-warming-republicans> (embedding clip from the TV News Archive). By opening up access to the embedded video clips, the TV News Archive allows readers of these articles to discover not only what politicians said, but also how they said it. This, in turn, enhances readers' abilities to reach their own conclusions about the significance and meaning of politicians' statements. Because they are publicly accessible, the clips can also be widely shared and viewed by large numbers of people: the clip of Senator Lee has been played over one million times and embedded on over one thousand other websites. *See U.S. Senate* (C-SPAN2 television broadcast Mar. 7, 2012, 10:34:27 AM), TV News Archive, https://archive.org/details/CSPAN2_20120307_140000_U.S._Senate#start/5667.8/end/5727.8. And the clip of Mike Huckabee has been played more than 58,000 times and embedded over 200 times. *See Huckabee* (Fox News television broadcast Dec. 20, 2009, 8:00:26 PM), TV News Archive, https://archive.org/details/FOXNEWS_20091221_010000_Huckabee#start/26.5/end/42.6. In this way, television archives serve as a springboard for discussion and ensure that the public has the opportunity to hold politicians responsible for the representations they make.

Similarly, collecting and indexing political ads allows journalists to access political advertising, fact-check potentially misleading statements, and share their conclusions with the public. FactCheck.org, a Political TV Ad Archive partner, is a nonprofit organization that monitors and checks the factual accuracy of politicians' statements in order to identify and expose misleading claims in political ads. For example, an ad in support of Hillary Clinton's presidential campaign stated that "in the last seven years drug prices have doubled." Eugene Kiely, *Clinton's Misleading Ad on Drug Prices*, FactCheck.org (Jan. 7, 2016), <http://www.factcheck.org/2016/01/clintons-misleading-ad-on-drug-prices/>. FactCheck.org pointed out, however, that prices for generic drugs, which make up over eighty percent of the market, actually decreased in that period. *Ibid.* Another ad claimed that Ohio Governor John Kasich's state budget proposal had "raised taxes by billions" of dollars; FactCheck.org noted that in fact the proposal called for a net tax cut. Robert Farley, *Distorting Kasich's Tax Plan*, FactCheck.org (Jan. 28, 2016), <http://www.factcheck.org/2016/01/distorting-kasichs-tax-plan/>. Importantly, journalists can embed video clips from the Political TV Ad Archive in their articles so readers can view the statements in their original form. This increases the impact of such reporting, since it allows ads and factual information to be compared side-by-side. It also allows voters to draw their own conclusions about the accuracy of political ads. Research suggests that exposure to fact-

checking affects voters' perceptions of candidates, with an especially strong effect when assertions in negative ads are challenged. See Kim Fridkin et al., *Liar, Liar, Pants on Fire: How Fact-Checking Influences Citizens' Reactions to Negative Advertising*, 32 Pol. Comm. 127, 146 (2015). Television archives encourage and enable such fact-checking and thus significantly empower voters to make more informed decisions when casting their ballots.

These benefits are not limited to the verbal elements of broadcasts; it is also important that visual features of political statements are available to observe, scrutinize, and share. As the district court noted, “[t]he actual images and sounds depicted on television are as important as the news information itself.” *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 392 (S.D.N.Y. 2014).

Collecting and indexing political ads allows journalists to analyze and report on the visual content of those ads. For example, another Political TV Ad Archive partner, PolitiFact, recently analyzed an ad in support of Donald Trump's presidential campaign, in which statements about “illegal immigration . . . on our southern border” were illustrated with black-and-white footage showing dozens of people running towards a border fence. C. Eugene Emery Jr. & Louis Jacobson, *Donald Trump's First TV Ad Shows Migrants 'at the Southern Border,' but They're Actually in Morocco*, PolitiFact (Jan. 4, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/jan/04/donald-trump/donald-trumps-first-tv-ad-shows->

migrants-southern-/; *see also* Political TV Ad Archive, https://politicaladarchive.org/ad/polad_donaldtrump_bh0ap/ (last visited Mar. 17, 2016) (Political TV Ad Archive page containing the ad and associated metadata). PolitiFact traced the source of the footage and found that it actually shows the Spanish-Moroccan border. PolitiFact gave the ad a rating of “Pants on Fire” for implying that the footage depicted the southern border of the United States, and it noted that there are currently more Mexican immigrants leaving than entering the United States. Similarly, prior to the 2014 New Jersey congressional election, an advocacy group ran an ad attacking candidate Aimee Belgard for her previous votes to layoff police officers and increase taxes. *NBC News at 5pm* (NBC television broadcast, Nov. 3, 2014, 5:13:03 PM), TV News Archive, https://archive.org/details/WCAU_20141103_220000_NBC_10_News_at_5pm#start/783.4/end/813.7. Unrelated to these issues, however, the ad briefly displayed a picture of a person being carried away on a stretcher, with the word “EBOLA” written across the screen. *See ibid.* Such fleeting images raise concerns that ads may include subtle messages that are intended to influence voter perceptions but remain difficult to detect. Sadie Dingfelder, *The Science of Political Advertising*, 43 *Monitor on Psychol.*, Apr. 2012, at 46.³ Persistent access to ads thus allows for

³ Another political ad, used during the 2000 presidential campaign, flashed the word “RATS” onscreen for a brief fraction of a second. The ad’s creator described

closer viewing and enables the public to more thoroughly explore an ad's visual content and judge the validity of the ad's claims.

In sum, the collecting and indexing of television content opens up public access to statements made by politicians. This facilitates scrutiny by the public and fact-checking by journalists, both of which promote an active, informed democracy.

B. Television archives aggregate and surface information about the broadcast content itself.

Beyond opening up access to discrete statements made by politicians, television archives generate and collect metadata—information *about* the television broadcasts—that researchers can process, mine, and analyze. Without access to these metadata, the volume of broadcasts would make it practically impossible for researchers to compare and contrast the treatment of a topic over time, by various networks, in different geographical regions, and across other variables. Researchers can use this information in combination with other data to uncover how the media influences public perception of issues and events and, conversely, how the public can shape the coverage and portrayal of the content that is broadcast. In light of this relationship, the ability to access metadata through

the placement of the word within the video clip as “a visual drumbeat designed to make you look at the word bureaucrats.” Dingfelder, *supra*, at 46. A later study found that quickly flashing the word “rats” in a political ad can depress viewers’ ratings of a candidate. *Ibid.*

television archives also promotes transparency by informing members of the public about who is trying to influence them and how.

1. Researchers use metadata associated with broadcast content to examine the relationship between the media and public perception of social issues and events.

Treating television content as data enables researchers to analyze how news broadcasts shape public perception of events and social issues. In one study, researchers found that television news coverage may cultivate inaccurate beliefs about health concerns. Jeff Niederdeppe et al., *Does Local Television News Coverage Cultivate Fatalistic Beliefs About Cancer Prevention?*, 60 J. Comm. 230 (2010); see also James M. Pribble et al., *Medical News for the Public to Use? What's on Local TV News*, 12 Am. J. Managed Care 170, 174 (2006) (noting discrepancy between the amount of West Nile Virus coverage and actual public health risk). Analyzing a month's worth of archived television news from 122 markets, the researchers observed that a large proportion of cancer news stories discussed scientific research on novel and controversial causes of the disease, "perhaps at the expense of well-documented causes and known prevention methods." Niederdeppe et al., *supra*, at 246. Comparing these reporting trends against surveys of the public's use of news media and its beliefs about cancer prevention, the study found that local television news tended to leave the public

with the distorted impression that either “everything causes cancer or that there are too many recommendations about cancer prevention.” *Ibid.*

Television archives also allow researchers to highlight how the public shapes the topics covered by the media and how those topics are portrayed. For example, researchers at MIT used data from the TV News Archive and other sources to study how news coverage of the fatal shooting of Trayvon Martin spread through mainstream and social media. Erhardt Graeff et al., *The Battle for ‘Trayvon Martin’: Mapping a Media Controversy Online and Off-line*, First Monday (Feb. 2014), <http://firstmonday.org/ojs/index.php/fm/article/view/4947/3821>. Specifically, the researchers found that although initial media coverage of the events was “local and short-lived,” the Martin family’s efforts to publicize the story resulted in a media resurgence, and an online petition played a key role in bringing the story to the forefront of social media discussions. *Ibid.* Additionally, the researchers uncovered an interplay between online and broadcast media that shaped the portrayal of Martin and of the person who shot him. *Ibid.* For instance, the study tracked the eruption of news reports that mentioned Martin’s name in conjunction with “marijuana” or “drug dealer” after a blogger asserted that Martin was a drug dealer. *Ibid.* Although most of the coverage disclaimed the accuracy of the assertion, the study demonstrated how certain actors were able to alter the framing of the story. *Ibid.* Such findings not only bear significant implications for

social change organizations seeking to spread their message, but also reveal ways media can be manipulated and how that can shape the historical account of events.

2. Providing access to metadata associated with broadcast content promotes transparency by informing members of the public about who is attempting to influence them and how.

Given the potential for television broadcasts to influence—and be influenced by—viewers, it is important for members of the public to be cognizant of the source of the messages they encounter on television. This importance is particularly salient in the context of political campaign advertising. Political television ads are generally broadcast to convey a candidate or sponsor’s message to the public or to supply voters with information that supports a particular stance on a debated issue. Rather than merely relaying these messages, however, television archives increase political transparency by revealing data about the ads themselves. The Political TV Ad Archive, for one, aggregates and provides users with composite information about when, where, on what networks, and how often each ad was aired, along with information about the ad’s source and funding. Reporters can use these aggregated metadata to comment on political advertising trends and arm voters with information about who is trying to influence them and how.

To illustrate one novel application, Andrew McGill of *The Atlantic* used metadata from the Political TV Ad Archive to design “an arcade-style game that

puts you in Iowa two days before the [2016 Iowa] caucuses, when television ads came at an average of every 45 seconds.” Andrew McGill, *Super Campaign Dodger: Can You Avoid Political Ads?*, Atlantic (Feb. 16, 2016), <http://www.theatlantic.com/politics/archive/2016/02/super-campaign-dodger/462531/>. The game resembles a television schedule, but the only listings that appear are presidential primary ads, which cascade down eleven different channels spread across the screen as time advances. *See ibid.* The ads actually appear on each channel at the same frequency as they were originally scheduled, except that time is accelerated in the game. *See ibid.* To win, the player must dodge the ads by shifting between channels across the screen. *See ibid.* In light of studies indicating that the sheer amount of political ad airtime influences polling behavior, *see, e.g., A Bit MEH*, Economist (Feb. 6, 2016), <http://www.economist.com/news/united-states/21689887-does-political-advertising-work-bit-meh>; Michael M. Franz & Travis N. Ridout, *Does Political Advertising Persuade?*, 29 Pol. Behav. 465 (2007), information on the pervasiveness of advertising is particularly relevant to understanding the factors that influence the outcome of elections. Journalists can also combine these metadata with other information to promote transparency about political ad targeting. For example, a Fusion.net article used data from the Political TV Ad Archive, along with viewer demographics of television programs during which

political ads aired, to unveil the target audiences of those ads. Daniel McLaughlin & Kate Stohr, *Why Bernie Sanders Loves Jimmy Kimmel and Hillary Clinton Loves Ellen*, Fusion Media Network (Mar. 4, 2016), <http://fusion.net/story/274374/candidates-political-ads-favorite-shows/>.

Journalists can also use these metadata to report on the coverage and sponsorship of political ads about specific issues. After identifying and tracking each time an ad aired about a ballot measure that would limit private short-term rentals in San Francisco, the Internet Archive drew attention to the vast discrepancy in airtime and funding between the two sides of the debate. Nancy Watzman, *Pro-Airbnb Political TV Ads Air at Rate of 100:1 as San Franciscans Head to Polls*, Internet Archive (Oct. 29, 2015), <http://blog.archive.org/2015/10/29/pro-airbnb-political-tv-ads-air-at-rate-of-1001-as-san-franciscans-head-to-polls/>. Picking up on this finding, other reporters subsequently covered the story in further detail. *See, e.g.*, Kim-Mai Cutler, *Airbnb, Proposition F and the Shared Hypocrisy of Bay Area Housing*, TechCrunch (Nov. 3, 2015), <http://techcrunch.com/2015/11/03/prop-f/>. In addition to outlining the pros and cons of each side of the debate, reporters provided a detailed breakdown of each campaign's sources of funding. *Ibid.* In doing so, they also identified the main group behind the initiative in support of the measure, putting to rest the rumor that it was championed by the city's hotel industry. *Ibid.* With accurate information

about the sponsorship and funding of political ads, voters gain a better understanding of the interests at play, the parties trying to advance those interests, and the consequences of their vote.

In sum, besides facilitating access to clips of previously broadcast content, television archives generate and make available metadata about the broadcasts. The availability of this aggregated information enables downstream users to understand the dynamics between the media and the public and enhances political transparency in broadcasting.

II. Legal certainty would allow a broader community of archiving services to flourish, preserving ephemeral media more effectively and unleashing the potential for applications of data that we have yet to discover.

Without a robust network of television archives, previously broadcast content often becomes inaccessible to the public and may even disappear entirely. In 1997, then Librarian of Congress James H. Billington wrote: “Television affects our lives from birth to death Sadly, we have not yet sought to preserve this powerful medium in anything like a serious or systematic manner.” James H. Billington, *Preface* to Libr. Cong., Report of the Librarian of Congress: Television and Video Preservation 8 (1997), <https://www.loc.gov/programs/static/national-film-preservation-board/documents/tvstudy.pdf>. Unfortunately, this observation still holds true nearly twenty years later.

The Internet Archive and a number of other organizations, including the Vanderbilt Television News Archive, UCLA Film & Television Archive, Julian P. Kanter Political Commercial Archive, and the Archives of Women's Political Communication, have certainly made strides in archiving television content. But they capture only a fraction of what is broadcast. As a result, "[f]uture scholars will have to rely on incomplete evidence when they assess the achievements and failures of our culture." *Ibid.* Instead of depending on a handful of libraries and archives—or broadcasters themselves—the growth and development of an ecosystem of television archives should be encouraged in order to preserve the cultural and historical record for future generations.

By providing libraries and archives with a narrow exception for recording and lending copies of television news programs, Congress demonstrated its understanding of the importance of archiving news broadcasts. *See* 17 U.S.C. § 108(f)(3). This provision does not protect the full range of worthwhile preservation efforts, however, so libraries, archives, and commercial entities rely on fair use when creating projects such as the Political TV Ad Archive. Without the "breathing space" that fair use guarantees, *see Campbell*, 510 U.S. at 579, creating comprehensive archives would be much more difficult, since copyright holders could withhold permission to collect, store, and index broadcast content. A

strong decision in this case affirming fair use will therefore encourage a broad community of archiving services to flourish.

A. Television broadcasts are ephemeral and easily lost if not adequately archived.

Television historically has not been preserved in an accessible form, if at all, and there are numerous examples of broadcasts that have been lost altogether. As BBC archivist Adam Lee noted in an interview, even when recording technology was available “people . . . didn’t see television as a permanent medium. They saw it as something that was transmitted, went out live, and was finished.” BBC Television Archive, *An Interview with Adam Lee, BBC Archive Expert*, BBC, http://www.bbc.co.uk/archive/tv_archive.shtml?chapter=3 (last visited Mar. 17, 2016). Consequently, some early television programs were broadcast live and never recorded, while some recordings were “deliberately destroyed, and videotapes were erased and recycled.” Libr. Cong., *supra*, at 9. For example, when broadcasters switched from using 16mm film to 3/4-inch U-matic videocassette tapes in the mid-1970s, nearly “25 years (covering approximately 1950-1975) of American state and local history were destroyed” and now “less than 10% of the news film libraries survive in public archives.” *Id.* at 11.

On a few notable occasions, television content has been preserved or resurrected only by chance. For many years, there was no complete recording of the first Super Bowl: the original CBS and NBC tapes were lost or recorded over,

and it was not until this year, “[i]n an exhaustive process that took months to complete,” that the NFL Films archive was able to piece together footage of the game’s plays from numerous sources. *Super Bowl I to Air After Long-Lost Footage Surfaces*, Fox News (Jan. 11, 2016), <http://www.foxnews.com/us/2016/01/11/super-bowl-to-air-after-long-lost-footage-surfaces.html>. Many episodes of the Doctor Who television series were also lost after the original tapes were destroyed; an archivist discovered nine of these lost episodes in the storeroom of a Nigerian television studio in 2013, but many others remain unaccounted for. Tim Masters, *Doctor Who: Yeti Classic Among Episodes Found in Nigeria*, BBC News (Oct. 11, 2013), <http://www.bbc.com/news/entertainment-arts-24467337>. As a final example, Marion Stokes, a Philadelphia resident and former librarian, singlehandedly recorded approximately 40,000 VHS tapes of television broadcasts between 1977 and 2012. Sarah Kessler, *The Incredible Story of Marion Stokes, Who Single-Handedly Taped 35 Years of TV News*, Fast Company (Nov. 21, 2013), <http://www.fastcompany.com/3022022/the-incredible-story-of-marion-stokes-who-single-handedly-taped-35-years-of-tv-news>. These tapes, which have been donated to the Internet Archive, preserve local news broadcasts that might otherwise have disappeared forever. *Ibid.*

Preservation of, and public access to, broadcast content continues to be fragile. For example, an editor of BBC World News commented, “We no longer

have the original tapes of our 9/11 coverage [I]f someone has got a recording of our output, I'd love to get hold of it.” Richard Porter, *Part of the Conspiracy?*, BBC News (Feb. 27, 2007), http://www.bbc.co.uk/blogs/theeditors/2007/02/part_of_the_conspiracy.html. The availability of content also can fluctuate over time. In 2013, the news network Al Jazeera blocked U.S. users from accessing the online streaming and clip archive portions of its international English-language service as part of a deal with cable and satellite operators when the separate Al Jazeera America television channel launched. John Jannarone & Keach Hagey, *Al Jazeera Embraces Cable TV, Loses Web*, Wall Street J. (Jan. 3, 2013), <http://www.wsj.com/articles/SB10001424127887323689604578220021064220016>. Access can thus be interrupted even when copies of the content still exist.

Furthermore, content that is made publicly available on broadcasters' websites is often not comprehensive. When news networks do provide clips of their own content online, they update and replace these clips as new facts come to light, consistent with journalistic ethics and the need to report the news accurately to the public. Scholar Deborah Jaramillo has discussed, for example, how pressure to cover the attacks of September 11, 2001 live led to speculation and inaccurate statements by news broadcasters, records of which were largely replaced when the stories were corrected. Deborah Jaramillo, Presentation at the 911 TV News Archive Conference: Fighting Ephemerality (Aug. 24, 2011), <https://archive.org/>

details/911conferenceDeborahJaramillo. Networks may also exercise discretion in making available only the clips that are most important to their audience. *See, e.g.,* Misenti Decl. at 12, *Fox News Network LLC v. TVEyes*, No. 13-cv-05315 (S.D.N.Y. Sept. 2, 2014), ECF No. 49 (“Another way that Fox News makes its television content available online is by continuously editing and posting video clips of its content The selection of what video clips will engage and inform Fox News’ audience is a matter of editorial discretion.”).

Archiving of television by third parties, on the other hand, can provide access to the complete record of what was broadcast, including earlier versions that are later corrected—that is, what actually aired at a given time in a given location. The Internet Archive’s September 11 Archive, for example, contains more than three thousand hours of television news recorded from twenty channels over seven days following the 9/11 attacks. While these news channels might update and correct the stories they make available online, the September 11 Archive preserves in full the minute-by-minute news coverage from that time period, regardless of the accuracy of the assertions therein. Third-party archives like this one have thus been crucial for ensuring that content is preserved and available to researchers, even as network offerings change over time.

B. Collecting and preserving a comprehensive collection of all television content would maximize the social benefits of research and technological innovation.

This haphazard approach to archiving is not a viable way to realize the benefits that follow from preserving a complete record for future generations. Rather, it gives rise to a record marred with gaps and composed of selective content, considerably impairing the accuracy and significance of research findings. To maximize the public benefits derived from television archives, archiving must be systematic, comprehensive, and publicly accessible.

For example, one cannot draw conclusions with sufficient scientific rigor when analyzing political television ads based on an incomplete set, as the available ads could differ from the missing ones in meaningful ways. *See* Travis N. Ridout et al., *Advances in the Study of Political Advertising*, 13 J. Pol. Mktg. 175, 176–77 (2014). Similarly, television archives’ role in promoting public discourse and political accountability is hindered when only certain statements made by politicians are available for scrutiny. And while analysis of the effects of television news on public perception has proven a fruitful endeavor, researchers have noted examining the effects of entertainment programming on public perception may also be promising. *See* Niederdeppe et al., *supra*, at 246–47.

Moreover, because this area of study is still quite recent and researchers are just starting to apply more advanced methods of analysis to these data, it may be

that some of the best uses of these data are yet to be discovered. Just a couple of years ago, researchers identified the study of emotional appeals in political ads as one of “several areas that are ripe for innovative research.” *See* Ridout et al., *supra*, at 189–91. Since then, researchers have already utilized artificial intelligence to analyze the visual content of political ads, finding a number of trends in the emotional expressions they depict. Kalev Leetaru, *What Does Artificial Intelligence See When It Watches Political Ads?*, Wash. Post (Feb. 8, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/08/what-does-artificial-intelligence-see-when-it-watches-political-ads/>. Applying this type of analysis more broadly to television news across the globe could have important implications for research in social psychology and conflict forecasting. *See, e.g.*, Kalev Leetaru, *Mapping World Happiness and Conflict Through Global News and Image Mining*, Forbes (Jan. 13, 2016), <http://www.forbes.com/sites/kalevleetaru/2016/01/13/mapping-world-happiness-and-conflict-through-global-news-and-image-mining/>.

Whether examining television broadcasts to study society, empowering citizens with information, or applying archives to an as-yet-unknown use, a comprehensive collection of data would be highly beneficial in realizing the public benefit of these endeavors.

C. Upholding fair use in this case would encourage the comprehensive archiving of television, which Congress has recognized as a worthy enterprise.

Recognizing the value in maintaining archives of broadcast content, Congress directed the Librarian of Congress to establish and maintain the American Television and Radio Archive (“ATRA”) to preserve, catalog, index, and provide historians and scholars access to broadcasts. 2 U.S.C. § 170(a) (referring to broadcasts as “the heritage of the people of the United States”); *see also* H.R. Rep. No. 94-1476, at 182 (1976) (emphasizing “need for such a repository” in light of television’s increased importance in American society). ATRA partners with “other libraries, archives, organizations, and individuals” to acquire source material for its collection. 2 U.S.C. § 170(a)(1)(C). To promote this practice, Congress enacted § 108(f)(3), which excepts libraries and archives from copyright infringement liability based on the “reproduction and distribution . . . of an audiovisual news program.” *See* H.R. Rep. No. 94-1476, at 76–77 (noting that the provision “is an adjunct” to ATRA).

Although § 108(f)(3) offers libraries and archives some protection against liability, the provision is too narrow. First, despite Congress’s intention that all broadcasts “which are of present or potential public or cultural interest, historical significance, cognitive value, or otherwise worthy of preservation” be archived, § 108(f)(3) applies only to the recording and distribution “by lending” of news

broadcasts. *Compare* 2 U.S.C. § 170 *with* 17 U.S.C. § 108(f)(3). Thus, television archives must rely on fair use to capture the wealth of broadcasts that Congress intended to be archived. Second, television archives not only reproduce and “lend” clips, *see* § 108(f)(3), but also aggregate, index, and extract data from television content to create searchable databases. In other words, fair use expands upon the protections offered by § 108(f)(3) to permit the creation of searchable archives of recorded television broadcasts.

Moreover, commercial television databases cannot invoke the protections of § 108(f)(3) because they record broadcasts for commercial advantage. *See* § 108(a)(1). Yet nonprofit archives like the Internet Archive rely on partnerships with commercial television databases to create publicly accessible archives of television broadcasts. In fact, the Political TV Ad Archive would have been less timely and comprehensive, and would have been more difficult to create, without this type of arrangement.

Congress’s explicit approval of archiving television strongly supports a finding of a valid purpose of use under the first fair use factor. As this Court suggested in *HathiTrust*, the rationale behind a specific exception to infringement may support the finding of a valid purpose. *See HathiTrust*, 755 F.3d at 102; *see also* Jonathan Band, *The Impact of Specific Exceptions on Fair Use: An Update* (Dec. 4, 2015), <http://ssrn.com/abstract=2708807> (noting that the Court considered

the purpose of 17 U.S.C. § 121 to support the conclusion that providing access to the print disabled was a valid purpose under the first fair use factor).

The existing archiving ecosystem is not sufficiently robust to collect and preserve all television broadcasts from all markets and prevent the further loss of historically and culturally valuable content. Litigation such as the one at bar chills the development of television archives. Indeed, one of the Internet Archive's commercial television database partners withdrew from the Political TV Ad Archive project in light of this very appeal. A strong decision affirming fair use in this case would foster the growth and development of a robust ecosystem of television archives. The resulting availability of comprehensive collections of television content will have lasting public benefit.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court issue a decision that will support rather than hinder the development of comprehensive archives of television broadcasts.

Dated: March 23, 2016

Respectfully submitted,

/s/ Brianna L. Schofield

BRIANNA L. SCHOFIELD
Samuelson Law, Technology &
Public Policy Clinic
UC Berkeley School of Law
356 Boalt Hall
Berkeley, CA 94720
(510) 644-4875
brianna.schofield@law.berkeley.edu

LILA BAILEY
The Law Office of Lila Bailey
25 Taylor Street
San Francisco, CA 94102
(415) 335-6833
lila@lilabailey.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,678 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 23, 2016

/s/ Brianna L. Schofield

BRIANNA L. SCHOFIELD

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of March, 2016, I electronically filed the foregoing Brief of *Amici Curiae* Internet Archive, American Library Association, Association of College and Research Libraries, Association of Research Libraries, and Society of American Archivists in Support of Defendant-Appellant-Cross-Appellee with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served with a Notice of Docket Activity, pursuant to Second Circuit Rule 25.1, by the appellate CM/ECF system.

Dated: March 23, 2016

/s/ Brianna L. Schofield

BRIANNA L. SCHOFIELD